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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ASSOCIATED PRESS,	)	05 Civ. 5468 (JSR)
Plaintiff,	)	**ECF Case**
v.	)	DECLARATION OF COLONEL DAVID A. SMITH
DEPARTMENT OF DEFENSE,	)	
Defendant.	)	

Associated Press v. United States Department of Defense Doc. 30

Pursuant to 28 U.S.C. § 1746, I, Colonel David A. Smith, declare as follows:

1. I am a Colonel in the United States Army, with 25 years of active duty service. I currently serve as the Commander of the Department of Defense (DoD) Criminal Investigation Task Force (CITF), Fort Belvoir, Virginia. I have been in command since July 11, 2006.

2. Prior to assuming command at CITF, I was assigned as the Commander of the 701st Military Police Group, United States Army Criminal Investigation Command from July 2004 until July 2006. The 701st Military Police Group supports the DoD, the Department of the Army (DoA), and military commanders by conducting sensitive classified investigations, major fraud investigations associated with the Army's acquisition programs, and computer intrusion

investigations, and by providing protective service for key DoD, DoA and visiting foreign officials. From January 2002 to June 2003,[1] I was assigned as the J3 at CITF. In this position, I coordinated the operations and policies of the Task Force as they related to world-wide criminal investigations of terrorism suspects.

3. As the Commander of CITF, I am directly responsible for the successful execution of its mission. Under the direction of the Secretary of the Army, CITF conducts worldwide criminal investigations to substantiate or refute alleged or suspected war crimes or acts of terrorism committed by certain individuals against U.S. persons, property or interests. CITF is a joint, operational, criminal investigative task force, comprised primarily of Special Agents from the U.S. Army Criminal Investigation Division, the U.S. Air Force Office of Special Investigations, and the U.S. Navy Criminal Investigation Service. The products of CITF investigations are used by the United States government to determine whether jurisdiction and appropriate chargeable offenses exist such that cases should be brought before military commissions.

Purposes of this Declaration

4. This declaration describes the creation of certain documents by CITF. It further explains the rationales for withholding portions of these documents from public release under the Freedom of Information Act (FOIA). Unless otherwise noted, the statements contained in this declaration are based upon my personal knowledge.

Documents Created by CITF for the Pre-Administrative Review Board Review Process

5. It is my understanding that the Associated Press (AP) has filed a FOIA request for "details and explanations of the decisions made to release or transfer detainees, including the reason why the decision was made." Although I was not the Commander of CITF before the

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[1] Between June 2003 and June 2004, I earned a Masters of Strategic Studies from the United States Marine Corps War College.

creation of the Administrative Review Board (ARB) process in June 2004, I am aware that there was a detainee assessment process in place before the ARB process was implemented. Through my official duties, I am aware of the details about that process described in paragraphs 6-11 and 13, below.

6. Under the pre-ARB review process, individuals detained by the DoD at Guantanamo Bay, Cuba were assessed for potential release or transfer through an interagency process managed by the Office of Detainee Affairs (DA). The decision regarding whether to release or transfer a detainee was made by the Deputy Secretary of Defense (DEPSECDEF). As part of this pre-ARB review process, CITF provided a law enforcement assessment of the detainees and a recommendation regarding their disposition to DA. The redacted February 3, 2004 memorandum attached to this declaration as Exhibit 1 ("CITF memorandum") is a representative sample of such a document created by CITF for a detainee who was ultimately transferred or released by the Department of Defense.[2]

7. A CITF memorandum typically consists of four categories of information: (i) background information regarding the detainee (in the attached sample, this information is found in the section entitled "Factual Synopsis"), including analytical conclusions drawn by intelligence and/or law enforcement personnel about that information, (ii) an assessment by CITF of the detainee's Law Enforcement Value and Threat Level (in the attached sample, this is found in the sections entitled "Recommendation" and "Threat Assessment"); (iii) a summary of the status of our law enforcement investigation of the detainee (in the attached sample, this information is found in the section entitled "Status of CITF Review Process"); and (iv) CITF's recommendation regarding whether the DoD should transfer, release, or continue to detain the individual (in the

[2] The name and duty title of the CITF employee who signed this memorandum have been withheld under Exemption (b)(6). It is my understanding that the AP is not contesting this withholding.

attached sample, this information is found in the section entitled "Recommendation" and also in the last paragraph of the memorandum).

CITF's Use of Information Originating from JTF-GTMO as Part of the Pre-ARB Review Process and the Justification for the Withholding of this Information

8. CITF often utilizes intelligence information gathered by JTF-GTMO, among other DoD components or agencies, during its investigation of the detainees. This information from other organizations was often incorporated into the memorandum written by CITF as part of the pre-ARB review process, and the information was also considered by CITF in reaching its conclusions and recommendations that were ultimately reflected in the CITF memorandum. When CITF reproduces, extracts, or summarizes JTF-GTMO's classified information in its own internal documents, CITF is required to carry forward pertinent classification markings to any newly created documents. CITF is not permitted to release such derivative information under FOIA and instead must refer the information to the OCA for action, in this case, JTF-GTMO.[3]

9. Background information about the detainee that originated with JTF-GTMO is contained in the "Factual Synopsis" section of the CITF memorandum. Additionally, JTF-GTMO's threat assessment is included in the "Threat Assessment" section of the CITF memorandum and JTF-GTMO's disposition recommendation is also referenced in the section entitled "JTF GTMO [ ] recommendation." The justification for the withholding of this JTF-GTMO-originating information is found in the Declaration of Rear Admiral Harry Harris.

Justification for the Withholding of CITF's Law Enforcement and Threat Assessments Under Exemptions (b)(1) and (b)(2)

10. The CITF memorandum also contains conclusions reached by CITF investigators and analysts regarding the law enforcement value of the detainee, as well as CITF's threat assessment

[3] I am not an Original Classification Authority.

for the detainee. This information is also included on the worksheet created by the Office of Detainee Affairs as part of the package of material provided to the Deputy Secretary of Defense.

11. In formulating our assessment of the threat posed by the detainee, CITF personnel always reviewed and used classified intelligence information gathered by JTF-GTMO and other DoD components or agencies. Therefore, our threat assessment is derivatively classified and is withheld from release under FOIA Exemption (b)(1) for the reasons stated in the Declaration of Rear Admiral Harry Harris.

12. Additionally, I have determined that this information should be withheld under FOIA Exemption (b)(2) (high) because it would disclose the internal guidelines followed by CITF in evaluating the relative law enforcement value and threat level of individual detainees. If this information was publicly released, a skilled and knowledgeable individual could put together patterns of law enforcement information that are important to the United States government and glean information regarding how this information is obtained, and then take steps to counter or thwart our law enforcement information-gathering means and methods.

Justification for the Withholding of the Status of CITF's Law Enforcement Investigation Under Exemption (b)(2)

13. In the section entitled "Status of CITF Review Process," the CITF memorandum contains information regarding the status of the law enforcement investigation. This section includes details about certain investigative steps undertaken by CITF and the results of certain agency and intelligence community database checks.

14. I have determined that the information about the investigative steps undertaken by CITF (including the agency checks) should be withheld under FOIA Exemption (b)(2) (high) because it would disclose the internal general guidelines followed by CITF in conducting its law enforcement investigations. If this information were publicly released, a skilled and

knowledgeable individual could discover information about the procedures followed during our law enforcement investigations and take steps to counter or thwart our ability to gather that law enforcement information in the future. Ultimately, this would damage U.S. national security and our ability to bring terrorists to justice.

15. This section also contains a chart that lists the intelligence community database searches conducted by CITF as part of its law enforcement investigation. In addition to being withheld under FOIA Exemption (b)(2) for the reasons stated in paragraph 14 above, this section is classified derivatively at the SECRET//NOFORN level because of the sensitivity of the connection between the procedures used in the investigation, the names of the databases and sources, and the results of the investigatory searches. The databases listed in this part of the memorandum are classified and releasing the results of those database searches reasonably could be expected to cause serious damage to national security because it would reveal that critical information.

Justification for Withholding CITF's Disposition Recommendation Under Exemption (b)(5)

16. The "Recommendation" section of the CITF memorandum and the last paragraph of the memorandum contain the recommendation of CITF regarding whether the detainee should be released, transferred or continued in detention. I have determined that this recommendation should be withheld under FOIA Exemption (b)(5) because its public release would discourage open and frank discussions between CITF and its superior organizations within DoD.

17. Our internal recommendations were provided to the DEPSECDEF before he made a decision regarding the disposition of the detainee. If these recommendations are publicly disclosed through the FOIA process, those involved in formulating such recommendations in the future would be dissuaded from providing complete, candid opinions and recommendations, due to fear that such opinions and recommendations may be made public. This would seriously erode the free exchange of information within and between our organizations and other DoD

organizations. Furthermore, the recommendations and analyses of various DoD components and agencies are provided to the DEPSECDEF for his consideration in deciding whether to transfer, release, or continue to detain a detainee, and such components and agencies do not always concur. Accordingly, the reasons and rationales for CITF's recommendation may not be those that ultimately served as the basis for the DEPSECDEF's decision regarding the detainee.

I declare under penalty of perjury that the foregoing is true and correct.

Executed this 17 day of August, 2006.

David A. Smith

COLONEL DAVID A. SMITH
Commander
Department of Defense Criminal Investigation Task Force